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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 523

JOHN L. LEWIS, JOSEPHINE ROCHE, and HENRY G. SCHMIDT, as Trustees, of THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, *Petitioners*,

v.

JOHN KOSTY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John L. Lewis, Henry G. Schmidt and Josephine Roche, Trustees of the United Mine Workers of America Welfare and Retirement Fund (hereinafter sometimes referred to as the "Trustees" and the "Trust", respectively), Petitioners, pray that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit in which judgment was entered May 23, 1963, and petition for rehearing *en banc* denied July 15, 1963.

A certified Appendix record in this case, together with the proceedings of the Court of Appeals, is furnished herewith, in accordance with the Rules of this Court.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is unreported and is printed in the Appendix to this petition (page 1a). The opinion of the United States Court of Appeals for the District of Columbia, printed in the Appendix hereto, (p. 3a), is reported at 319 F. 2d 744. The Court of Appeals denied the petition for rehearing (R. 135) by an order *Per Curiam* without opinion (App. 35a; R. 174).*

JURISDICTION

The judgment of the Court of Appeals was entered May 23, 1963 (R. 134). Petition for Rehearing En Banc or in the alternative by the Division was timely filed and denied by the court on July 9, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err by ruling that trustees of a welfare and retirement trust fund created in accordance with the Labor Management Relations Act of 1947, as amended, must give notice to prospective beneficiaries of proposed amendments to eligibility requirements thereunder when it was conceded by the same court that the Trustees were vested with the discretion to promulgate and modify such requirements and the Trust Instrument did not require such notice?

2. Did the Court of Appeals err in considering *sua sponte* notice to prospective beneficiaries as a condition precedent to Trustees' modification of eligibility requirements without first remanding the case to the District Court to afford Trustees the opportunity to present evidence to demonstrate the basis of the change in eligibility requirements?

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* The abbreviation "App. —" refers to the Appendix to this Petition. The abbreviation "R. —" refers to the certified record of this case filed with the Clerk of this Court.

3. Did the Court of Appeals err by directing the District Court to enter judgment for respondent when neither the Trustees nor the District Court had passed upon whether respondent had completed the requisite 20 years of employment in the bituminous coal industry, such always having been a condition of eligibility?

4. Did the United States Court of Appeals act properly by deciding defenses as to statute of limitations and laches to an action where the District Court specifically did not rule thereon and none of the parties to the action had briefed or argued the issues before the Court?

STATUTES INVOLVED

The statutory provisions involved are Labor Management Relations Act, 1947, Section 302(c)(5) [29 U.S.C., Section 186(c)(5), 61 Stat. 157], and Title 12, Section 201, District of Columbia Code. They appear in the Appendix hereto, pp. 32a and 34a, respectively.

STATEMENT OF THE CASE

On March 22, 1960, respondent, a coal miner, instituted a civil action in the United States District Court for the District of Columbia for judicial review of a decision by the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 denying his application for a pension (R. 2).

On March 5, 1950, coal operators signatory to the National Bituminous Coal Wage Agreement of 1950 and the United Mine Workers of America, a labor union, as settlors, created a discretionary trust, of which petitioners are trustees, within the framework of Section 302(c)(5) of the Labor Management Relations Act, 1947. [Title 29 U.S.C. Section 186(c)(5)] (App. 32a).

By the terms of the Trust Indenture, the settlors granted to the Board of Trustees, whose duty it was to administer this trust, the following specifically enumerated broad and encompassing discretionary powers (App. 16a; R. 40):

> "Subject to the stated purposes of this Fund, *the Trustees shall have full authority*, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, *with respect to questions of coverage and eligibility*, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, *and all other related matters.*" (Emphasis added)

On April 5, 1950, the Trustees, acting pursuant to that authority established by Resolution 10 (App. 19a; R. 42) the following eligibility requirements for a pension, each of which must be unequivocally met before a pension can be awarded:

> "An applicant shall be eligible for a pension if he meets the following requirements:
>
> A. Attained the age of sixty (60) years or over at the time of his application for pension.
>
> B. Retired by permanently ceasing work in the Bituminous Coal Industry after May 28, 1946.
>
> C. Been employed for a period of at least one year in the Bituminous Coal Industry immediately preceding his retirement.
>
> D. Completed twenty (20) years service in the Coal Industry in the United States, its possessions or territories, or the Dominion of Canada . . ." (App. 20a: R. 43).

This Resolution further provided that it would be ". . . subject to amendment, revocation and revision at the discretion of the Trustees" (App. 24a; R. 43).

On January 29, 1953, the Trustees annulled Resolution 10 and adopted Resolution 30 which was effective on that date and provided, among other things, that an applicant for a pension must have completed twenty years service in the coal industry within the twenty-five years immediately preceding his application for a pension (App. 23a; R. 46). On March 13, 1953 the Trustees amended Resolution 30, by broadening and enlarging this requirement, stating that an applicant must have completed twenty years service in the coal industry within the thirty years immediately preceding his application for a pension (App. 27a; R. 50). This amendment was made retroactive to January 29, 1953.

Respondent retired from the coal industry by permanently ceasing work on June 26, 1953. He filed an application for a pension which was denied by the Trustees on August 7, 1953, on the grounds that he did not meet the requirements of Resolution 30, as amended in that he did not have twenty years of completed service in the coal industry within the thirty years immediately preceding his application for a pension (R. 52). In this regard respondent testified that in December, 1952 (prior to the amendment of eligibility requirements) he had been told by an officer of his local union that the regulations had been changed and was advised to make his application so he would be "sure" of being eligible.[1] Respondent, however, did not retire until after the amendments took effect, to wit, June 26, 1953 and did not file his application until July 7, 1953 (R. 53).

Respondent insitituted this action six and one-half years later (R. 2).

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[1] This appears in the typewritten transcript of the proceedings in the District Court, page 43.

The District Court held that respondent had not completed twenty years' service in the coal industry within the thirty years immediately preceding his application for a pension as required by the resolution in effect at the time of his retirement. The District Court further found that respondent was not eligible for a pension under the prior Resolution 10 because he had not retired and had not made application for a pension while the resolution was in effect as explicitly required by Trustee regulations. The Court's opinion reads:

> ". . . The defendants denied plaintiff's application for pension on the grounds that he was not eligible for a pension in that he had not completed 20 years service in the coal industry within the 30-year period immediately preceding his application for pension . . . the Court finds and concludes from that evidence and the other evidence presented at the trial that there is substantial evidence to sustain the decision of the Trustees."
>
> * * *
>
> ". . . The Court concludes that at the time of the amendment of the eligibility rules, *plaintiff was not eligible for a pension in that he had not retired fro[illegible] or ceased work in the bituminous coal industry as required by the eligibility rules before amendment.*" (Emphasis supplied) [App. 1a-3a; R. 8-9].

The District Court made no finding of fact with respect to respondent's employment prior to 1923, that being the date of the commencement of the thirty years period as set forth in Resolution 30 as amended. Likewise, the Trustees had made no investigation of respondent's employment prior to 1923 for the same reason. No evidence was introduced by the Trustees in this regard. They conceded twelve years of completed employment in the coal industry within the thirty

years immediately preceding his application for a pension.

The Court of Appeals acknowledged that the scope of judicial review in this case was limited to a determination as to whether the Trustees had acted arbitrarily and capriciously with regard to respondent. It also conceded and recognized "that the trustees have been accorded wide latitude in specifying from time to time what the eligibility qualifications shall be," (App. 9a; 319 F. 2d 748) including the "authority . . ./to revise pension eligibility requirements in the light of their experience." (App. 11a; 319 F. 2d 748) The Court, however, reversed the judgment of the District Court without evidence of the reasons for or reasonableness of Trustees' action, holding that the changing of the requirements of eligibility by the Trustees without a general prior notice of intent to make such changes constituted arbitrary and capricious action by the Trustees (App. 11-12a; 319 F. 2d 749).

The Court of Appeals further ruled that the plaintiff's application was to be considered under Resolution 10. It did not remand the case to the District Court or to the Trustees for initial review in this regard. Instead the appellate court upon the limited record below ruled that respondent was eligible for a pension retroactive to the date of his retirement (App. 13a; 319 F. 2d 749).

The Court of Appeals also rejected the defense of laches as not being applicable to the case.[1a] It then dispensed with the defense of the statute of limitations on the basis that the Trustees continued to review respondent's application, there being no final rejection

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[1a] This issue was neither argued nor briefed before the District Court, nor in the Court of Appeals. *Further, it was an issue not decided by the District Court.*

of plaintiff's application until the filing of the answer herein.[2]

On June 7, 1963, Trustees filed a Petition for Rehearing En Banc or in the Alternative by the Division, which was denied on July 9, 1963 (App. 35a; R. 174). This Petition seeking review of the adverse rulings herein stated followed.

REASONS FOR GRANTING THE WRIT

INTRODUCTORY: COMPARISON OF THE OPINIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS

The Court of Appeals held that the Trustees were arbitrary and capricious as a result of changing pension regulations without notice to potential beneficiaries. However, nowhere in its opinion did the District Court expressly deal with the subject of notice. The District Court dealt solely, and Trustees submit properly, with determining whether the Trustees were arbitrary and capricious by determining that the respondent had not met Trust Fund pension regulations. It ruled the Trustees were not arbitrary and capricious in deciding that respondent had met neither the eligibility requirements of Resolution 10 when that Resolution was in force, nor the eligibility requirements of Resolution 30 which was in effect when respondent retired and applied for a pension (App 2a).

Since respondent met neither the eligibility requirements of Resolution 10 nor of Resolution 30 when they

[2] This issue similarly was not briefed or argued in the District Court nor in the Court of Appeals. *Similarly, the District Court did not adjudicate the issue.* Moreover, the Trustees' administrative file introduced below as Defendants' Exhibit 3 reveals plaintiff's pension application was rejected on August 7, 1953, and all subsequent action by the Trustees, including voluminous exchanges of correspondence with plaintiff and others, was consistent with such rejection.

were respectively in force, the District Court found it unnecessary to reach the question of notice. By contrast, the Court of Appeals did not concern itself so much with the attainment of eligibility requirements by respondent as with the necessity for notice. The Court of Appeals appears to have assumed that the respondent met the requirements of Resolution 10; doing so by equating "permanently ceasing work", as required therein, with the proposition that respondent "could have qualified" by a simple election to stop working or that "all that is lacking is the actual termination of employment" (App. 10a; 319 F. 2d 748).

Accordingly, the difference between the opinions of the District Court and the Court of Appeals is a simple one: The District Court found respondent did not meet the explicit requirements of Resolution 10 since he had not "retired by permanently ceasing work" during the period of its effectiveness, while the Court of Appeals found respondent had in effect substantially complied with Resolution 10 (App. 1a, 13a; 319 F. 2d 749).

Factually, it cannot be disputed that respondent was ineligible under Resolution 10 for respondent had not retired by "permanently ceasing work" in the industry during the time when Resolution 10 was in force. Trustee regulations are clear and explicit. "Permanently ceasing work" means just that, the same as the "age of sixty" means the 60th birthday, not the 59th birthday; or the same as being employed "one year immediately preceding his retirement" means 12 months next preceding his retirement; or the same as completion of "20 years of service" means 20 years, not 19 years. Accordingly, it appears that the District Court's conclusion is logically correct because its factual premise is sound.

1. This Petition Presents a Case of First Impression to This Court Governing the Scope of Permissible Authority Which Can Be Delegated By Settlors to Trustees of a Welfare Trust Fund Created by a Collective Bargaining Agreement in Accordance With Section 302(c) of the Labor Management Relations Act, 1947, as Amended

The importance of this case as legal precedent to guide the administration of the instant Trust, as well as to the future establishment and administration of similar welfare trust funds created pursuant to Section 302(c) of the Labor Management Relations Act, 1947 (Title 29 U.S.C. Section 186(c)), cannot be overstated, for it runs to the heart of the powers which can be bestowed upon and exercised by trustees of a welfare trust created pursuant to that section.

At the outset, it is important to distinguish the case now presented from a case where trustees are claimed to have acted contrary to the powers granted to them by the trust agreement, contrary to their own rules or contrary to the Labor Management Relations Act, 1947. No such issues are involved here. Similarly, the instant petition does not question whether eligibility requirements can be modified after an applicant has met previously existing requirements, nor does it reach the issue of notice to applicants who have previously qualified.

The issue raised here is whether the Trustees, in the exercise of their discretion, can lawfully amend eligibility requirements without first giving notice to *prospective beneficiaries* who had not qualified prior to the date of the amendments.

Prior to the instant decision, the right of an employee of one of the bituminous coal operators signatory to the Agreement to receive a pension from the

Trust was governed by the eligibility requirements in effect at the time of filing of his application. *Dauti v. Lewis* (D.C. Cir., 1962) — U.S. App. D.C. —, 312 F. 2d 345. And, while a pensioner, once having had his pension application approved, is not affected by later amendments of the eligibility requirements, he has no perpetual rights in the Trust since all pensions as a class can be reduced or eliminated by the Trustees if the financial condition of the Trust so warrants.

The Court of Appeals has now ruled in essence that amendments to eligibility requirements are not valid as to prospective beneficiaries who are capable of meeting the earlier standards, but have not elected to do so, unless they had been given advance notice or a grace period. Since the Trustees have no way of knowing in advance what a prospective applicant's particular status might be, or who among the prospective beneficiaries might elect to retire and apply for a pension, the limitation thus imposed requires, as an empirical reality, that advance notice be given by the Trustees to all employees of coal operators signatory to the Agreement prior to any amendments of eligibility requirements if such amendments are to be fully effective.[3]

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[3] In this regard, the appellate court stated:

"We do not say that actual notice to each employee of his opportunity so to elect would be necessary to defeat a claim, since there may be problems of identification and communication which the Trustees may not be able to overcome in every case, although no point of this kind is made on their behalf in the record of this case. We do say that it was clearly not beyond the capacity or resources of the Trustees to have devised some system of publicity for the impending change which reasonable men would regard as having fulfilled their fiduciary undertakings." (App. 11a, 319 F. 2d 749)

No such limitation is found or even remotely suggested by the trust instrument, nor is there any suggestion that the settlors of this trust, namely, the Union and signatory coal operators, desired to impose such a limitation. To the contrary, the settlors clearly and unequivocally granted complete discretion in the Trustees with regard to eligibility requirement (App. 16a; R. 40).

Further, since it is conceded by the Court of Appeals that the Trustees have the power pursuant to the Agreement to establish and modify not only eligibility standards but also the amount, if any, of the pensions, it is difficult to comprehend why modifications of eligibility requirements made effective as of the date of their pronouncement are invalid, at least, insofar as mere prospective beneficiaries are concerned.

It has long been established that legislation takes effect as of the date of its enactment unless it or another statute or constitutional provision provides that another date shall apply.[4] *Matthews* v. *Zane et al.* (1822) 7 Wheat. 164, 5 L. ed. 425; *Lapeyre* v. *United States*, (1873) 17 Wall. 191, 21 L. ed. 606. And, as this Court said in *Ruppert* v. *Caffey*, (1920) 251 U.S. 264 at 301, 64 L. ed. 260 at 276:

> "... Hardship resulting from making an act take effect upon its passage is a frequent incident of permissible legislation; but whether it shall be

[4] Nor is legislation considered retrospective in operation because it may be dependent upon facts arising prior to enactment. *Savorgnan* v. *United States* (7 Cir., 1949) 171 F. 2d 155, aff'd 70 S. Ct. 292, 338 U.S. 491, 94 L. ed. 287; 15 A.L.R. 2d 538; rehearing den. 70 S. Ct. 564, 339 U.S. 916, 94 L. ed. 1341 (loss of citizenship); *John McShain Inc.* v. *District of Columbia* (D.C. Cir., 1953) 205 F. 2d 882, 92 U.S. App. D.C. 358, cert. den. 74 S. Ct. 227, 346 U.S. 900, 98 L. ed. 400 (imposition of tax).

imposed rests wholly in the discretion of the law-making body."[5]

There is also evidence that Congress itself felt that the discretion and right of immediate action conveyed to Trustees in this regard was proper. Thus, the Douglas Committee's Report[6] recognized that "eligibility conditions . . . have been changed a number of times"; as a result "a considerable number of persons" were denied pensions "who would otherwise have been eligible under the former requirements"; and that "the mounting costs of the pension program required some tightening up of eligibility conditions." (App. 30-1a) It is significant that the remedial legislation which followed did not require that notice of proposed changes in eligibility requirements be given to persons who "would otherwise have been eligible" prior to the effective date of such amendments.[7]

The District Court for the Western District of Pennsylvania has aptly questioned the advisibility of extending judicial surgery of this Trust to encompass such discretionary aspect, noting:

> "It is not the province of the court to whittle away the purport and tenor of a trust created by authority which stems from Act of Congress, 29

[5] See also *Spokane Hotel Co.* v. *Younger* (1920) 113 Wash. 359, 194 P. 595 (wherein the Supreme Court of Washington held that notice was not a prerequisite to validity even though hardship might result).

[6] *Welfare and Pension Plans Investigation, Final Report submitted to the Committee on Labor and Public Welfare by its Subcommittee on Welfare and Pension Funds pursuant to S. Res. 40, as extended by S. Res. 200 and S. Res. 232 (84th Congress)* (App. 28a).

[7] Title 29, U.S.C. Section 301 et seq.; Title 29, U.S.C. Section 401 et seq.

U.S.C.A. Sec. 186(c). Where deviation might exist from regulations adopted by the Trustees, the remedy lies against the Trustees for violation of said trust, and where regulations are deemed unjust, the remedy must lie with Congress. For the courts to interject themselves in the fragile and delicate operations of a trust which requires expertise knowledge of trustees who have been selected for their know-how and familiarity with the inner workings of a vast and complex pension program, would prove inimical to the best interests of the trust and the employees for whose benefit it was created." *Kough* v. *Lewis* (D.C., W.D. Pa., 1961) 195 F. Supp. 657, 658.

Petitioners submit that the following principle laid down in *Shelton* v. *King* (1913) 229 U.S. 90 at 94-95, 57 L. ed. 1086 at 1088 should control here:

"... It is a settled principle that trustees having the power to exercise discretion will not be interfered with so long as they are acting bona fide. To do so would be to substitute the discretion of the court for that of the trustee. Upon the same and even stronger grounds a court of equity will not undertake to control them in violation of the wishes of the testator. To do that would be to substitute the will of the chancellor for that of the testator. Lewin, Trusts, 2d Am. ed. 448; Nichols v. Eaton, 91 U.S. 716, 724, 23 L. ed. 254, 256."

The impact of the decision of the Court of Appeals as an unwarranted intrusion upon the discretionary functions of the Trustees cannot be avoided by stating that the court was not concerned with "*what* the qualifications should be", but rather with "*how* changes are to be made" (App. 9-10a; 319 F. 2d 748). This is a meaningless distinction, for the Court in essence has nullified the amendment made by the Trustees with

regard to all potential beneficiaries who might have been able to retire and establish their eligibility as of January 29, 1953. The Court's opinion is at variance with the trust instrument and substitutes the Court's discretion for that of the Trustees.

2. The Court of Appeals Should Have Remanded the Case to the District Court to Enable the Trustees to Evidentially Demonstrate the Sound Basis for the Change of Pension Regulations Without Notice to Potential Beneficiaries Before Ruling That Such Change Without Notice Was Arbitrary and Capricious and Causing the Oppressive If Not Intolerable Financial and Administrative Burden to the Fund

As indicated above, the Court of Appeals without factual foundation found the Trustees to have been arbitrary and capricious because no prior notice of pension regulations changes was given to potential beneficiaries, while neither the requirement to give notice nor the reasons for the change of regulations without notice were considered by the court below, nor does such mandate appear in the Trust Indenture.

The motivating circumstances must be considered in conjunction with the Trustees' exercise of discretionary powers bestowed upon them by the Trust Instrument. Indeed, the Court of Appeals was not oblivious of the fact such motivations should be considered when it acknowledged that the Trustees have authority "to revise pension eligibility requirements in the light of their experiences". The court recognized "[F]lexibility . . . seems essentially necessary for the operation of this Fund tied as it is to the fluctuating fortunes of the Coal Industry" and that "trial and error" in "trust relationship . . . are involved" (App. 11a; 319 F. 2d 748-9). While it held that such flexibility must "operate within some limita-

tion of fundamental fairness," (App. 11a; 319 F. 2d 749) the same "fundamental fairness" applied to the Trustees and the Fund beneficiaries requires a thorough review of all facts forming the foundation for Trustees' action. Yet the Court of Appeals, void of factual foundation, went on to find the Trustees arbitrary and capricious for changing pension eligibility requirements without notice to potential beneficiaries. Certainly it cannot be properly said by any court that such action by the Trustees in and of itself is arbitrary and capricious *per se*, since many factors, circumstances, motivations, experiences and general trustee expertise could make it expedient if not mandatory that the regulations in good faith be changed without notice. A thorough review and evaluation of all facts forming the foundation for Trustee action must be made. It well could be, and we say here it was, necessary to make such changes in trustee regulations without notice in order to carry out the legal and fiduciary obligation imposed upon the Trustees to protect the trust res, assure sound fiscal policy in relationship to revenue and expenditures and also assure efficient and effective administration of this inter vivos trust fund.

The Douglas Committee Report sounded one of the main reasons for the without notice change in pension regulations when it cited that "the mounting costs of the pension program required some tightening up of eligibility conditions." That report states:

> "The eligibility conditions for pensions have been changed a number of times. An important change was made in 1953. . . . In 1953 these conditions were changed to require that the 20 years of services must have been within the 30 years preceding retirement, and that the applicant must have been

regularly employed in a classified job immediately prior to May 29, 1946.

"These changes have caused a considerable number of persons to be denied pensions who would otherwise have been eligible under the former requirements. (As indicated above, approximately a third of all denials in the 1955 fiscal year were on the ground that the applicant had not been employed in the industry immediately prior to the inception of the fund.) The main reasons for these changes were that the fund was finding that many individuals who had retired or had left the industry prior to May 29, 1946, were obtaining temporary employment as miners only to qualify for pensions, and the mounting costs of the pension program required some tightening up of eligibility conditions." (App. 30-1a)

There were other factors to consider which affected sound fiscal policy. There were "pension mills" or synthetic so-called coal mines set up to supply pseudo employment to ostensible coal miners to enable qualification for Trust Fund pension though such individuals had long been absent from the coal industry. Other former miners who had left the coal industry during World War II and the Korean conflict for more remunerative war industries were attempting to return to the coal industry solely for one year's employment so as to qualify for a pension. Were the change not immediately made, therefore, these individuals would have easily caused pension costs to reach or possibly exceed an estimated yearly cost of $100,000,000 that statistical information available to the Trustees at the time of the January, 1953 change predicted they might.

It is not necessary to labor the obvious. The Trust could not tolerate this drain, even for a limited period

if it were to endure. Of necessity, the amount of pensions payable to existing pensioners would have to be drastically reduced and severe hardships upon existing pensioners who have adjusted their living to the existing rates were bound to follow. In this regard, it should be remembered that the Trustees have a duty to act not only in the best interests of possible potential beneficiaries but also to protect the best interests of existing pensioners and conserve the trust res. It must be remembered that once adopted, the new regulations must be uniformly applied and no exception to them may be made for any individual.

The obvious purposes of the change in eligibility requirements, therefore, were to preserve the financial integrity and stability of the Trust and assure sound administration. Thus, what appears to have been arbitrary and capricious conduct towards a single individual may at the same time reflect and represent beneficent and well deserved consideration toward all beneficiaries. Except for a statement of these principles in their petition for rehearing before the Court of Appeals, the Trustees here have been given no opportunity to present the basis for their action.

3. The Court of Appeals Erroneously Ordered the District Court to Enter Judgment for Respondent When Important Facts Bearing on Entitlement Had Not Been Considered by Either the District Court or the Trustees Because of Their Resolution of the Case on a Principle of Law Later Repudiated by the Court of Appeals

The Trustees, under the duties imposed upon them by the Agreement, clearly had the right, and indeed the obligation, to pass upon qualifications of applicants for a pension. *Szuch* v. *Lewis* (DC., D.C. 1960) 193 F. Supp. 831 at 835. And where new facts relating to an applicant who sought a pension have arisen;

the courts have remanded these issues to the Trustees, after determining the controlling issues of law, so that the Trustees can perform their functions. See *Harper* v. *Lewis* (DC., D.C. 1960) 186 F. Supp. 285; *Ruth* v. *Lewis* (DC., D.C. 1958) 166 F. Supp. 346.

Here the Trustees did not pass upon whether respondent had been employed 20 years in the industry, which was one of the criteria even under the original requirements which the Court of Appeals said must govern the instant case. Instead, the Trustees considered respondent's employment in the industry only from 1923 forward, that is, the period 30 years prior to respondent's employment. This was the test the Trustees believed to be applicable. For this reason the Trustees did not introduce any evidence or even check on respondent's employment for the 20 year period requirement, which was partially dependent upon alleged employment in the industry prior to 1923.

The trial court similarly, in its disposition of the case, found no occasion to pass upon this fact. The Court of Appeals, however, apparently ignored this situation and held that in view of respondent's testimony that he had worked for 20 years in the industry, which as stated above was not controverted, he was entitled to a pension, and ordered the District Court to enter judgment accordingly. In essence, the Court of Appeals has heard but one side of this important facet of the case—this because of the misconception of both the Trustees and the trial court as to the standards to be applied.

This Court, in *Marconi Wireless Tel. Co.* v. *Simon* (1918) 246 U.S. 46, 38 S. Ct 275, 62 L. ed. 568, in a similar situation, held that:

"It follows, therefore, that to finally decide the case would require us to determine whether or not the apparatus as furnished was a direct infringement or mere contribution. But to do this would call for the exercise on our part of a duty which it was the province of the court below to perform, and which doubtless it would have performed but for the error into which it fell concerning the interpretation of the Act of 1910, . . .

* * *

"Our order, therefore, will be one reversing the decrees of both courts below and remanding to the District Court, to the end that, in the light of the construction which we have given the Act of 1910, the rights of the parties may be considered and determined.

"Reversed and remanded." (246 U.S. at 57, 58; 62 L. ed 573, 574)

Likewise in *Szuch* v. *Lewis* (DC., D.C. 1960) *supra*, the trial judge recognized that such determinations as to eligibility rest upon the Trustees and not the courts (193 F. Supp. 835):

"Upon plaintiff's application for a pension they exercise their discretion to interpret the scope of one of these requirements. Their interpretation of the clause, "employed in the Bituminous Coal Industry," was such that plaintiff's status did not fall within the requirement. There is no evidence they acted in bad faith, arbitrarily or capriciously. The fact that the Court might interpret this term in a broader sense has no bearing, since it is the discretion of the trustees that controls."

Petitioners do not dispute the authority of the Court of Appeals or this Court to take such appropriate action "as may be just under the circumstances." *Tinder* v. *United States* (1953) 345 U.S. 565, 73 S. Ct. 911, 97 L. ed. 1250. Petitioners do say, however, that under

the circumstances of this case, and in accordance with the *Marconi* and *Szuch* decisions, *supra*, justice is not served by allowing the Court of Appeals to determine facts as to eligibility to a pension from the Trust, when neither the trial court nor the Trustees have passed upon a salient point of eligibility due to their conception of the law.

4. The Court of Appeals Imposed a Binding Precedent on Petitioners, With Respect to the Defenses of Laches and the Statute of Limitations, Without the Trial Court Having Passed on the Issues, and Neither Petitioners Nor Respondent Ever Having Briefed or Argued These Points

Each year similar actions for pensions are instituted. In a majority of the cases the suits are commenced more than three years after the Trustees' denial of the pension application. This Fund, like many other similar organizations, operates upon principles of statistics. It is detrimental to the welfare of the Trust and existing beneficiaries to permit an applicant to sleep on his rights for an extended period and then obtain a retroactive pension. In the instant case, according to the judgment of the Court of Appeals, respondent will receive a retroactive pension of ten (10) years.

Had the opportunity been available, petitioners would have advanced a concept that an action for a pension is divisible into two parts. In considering a similar problem, the Supreme Court of Colorado, En Banc, said in *Board of Trustees of the Policeman's Pension Fund of the City of Pueblo* v. *Koman*, (1956), 298 P. 2d 737, at 741, 133 Colo. 598:

> "The right to receive a pension is a very different right from the right to receive payment once the

> basic right to receive a pension itself has been determined. Once the right to receive a pension has been determined, then the receipt of the pension is a continuing one. The basic or primary right (to receive the pension) is not a continuing one and may be barred by laches or the statute of limitations."

See also *Dillon* v. *Board of Pension Commissioners of the City of Los Angeles*, (1941) 18 Cal. 2d 427, 116 P. 2d 37. As the Court of Appeals indicated (App. 3-4a; 319 F. 2d 745), the basic action involved is one to establish status as a beneficiary of the trust. Such an action, being in equity, should be subject to the defense of laches. The right to receive periodic payments once the basic right to a pension is established, is a very different right and should be subject to the statute of limitations, being an action at law. Applying such a rule to the instant case, respondent, if laches were not applicable, would receive pension payments from March, 1957 to date. This is computed by applying the District of Columbia statute of limitations of three years. (Title 12, Section 201, D. C. Code)

The adoption of such a rule would not be dependent upon the fact that this is a discretionary trust. It would be applicable to all types of pension trusts. An applicant could be deprived of his right to a pension only if laches were proven, but the integrity of the trust and the rights of existing beneficiaries would be protected by allowing recovery of prior pension payments only within the existing period of the statute of limitations.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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